No. 97-1147

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER AND
MELVIN JOHNS,

Respondents.

On Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Was the Minnesota Supreme Court correct when it found that respondents, as social guests, had a reasonable expectation of privacy in the home they were visiting?

2. Was the Minnesota Supreme Court correct when it found that Officer Thielen, by leaving the sidewalk, walking across the grass and staring into the apartment window from a distance of twelve inches, violated the Fourth Amendment?

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STATEMENT OF FACTS

The facts, as conclusively stated by the Minnesota Supreme Court:[1]

> At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, had told Thielen that he/she had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen

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[1] In its brief, the State of Minnesota complains that "the Minnesota Supreme Court was mistaken in its recitation of the facts of this case[.]" State's brief at 28. The state did not, however, move to correct these "mistakes" in a petition for rehearing before the Minnesota Supreme Court, which it certainly had a right to do. *See* Minn.R.Civ.App.Pro. 140.01. Furthermore, the Minnesota Supreme Court takes great care in reviewing trial exhibits, such as the pictures in this case, which certainly indicate that the officer could not have seen what he said he saw from the place he said he was. *See, e.g., State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (rejecting trial court factual finding because physical evidence – tape which the court had the benefit of listening to – was to the contrary). Finally, as this Court has stated: "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this court." *Watts v. Indiana*, 338 U.S. 49, 50 (1949).

then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The window's blinds were drawn closed, but gaps in the blinds allowed Thielen to observe the activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as

a part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant Kimberly Thompson. At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile

driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to the police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

State v. Carter, 569 N.W.2d 169, 172-173 (Minn. 1997) (footnotes omitted).

SUMMARY OF ARGUMENT

The Minnesota Supreme Court held that respondents, as social guests, had a legitimate expectation of privacy in the home they were visiting, and, consequently, could object to the police officer's actions in this case. The court

also ruled that the police officer's action – peering through small slits in drawn blinds from a distance of twelve inches – amounted to a Fourth Amendment search.

The Minnesota Supreme Court was correct. Respondents have a right to object to the search because, as social guests, they have a legitimate expectation of privacy in the home which was invaded by the officer. The history of the Fourth Amendment, which indicates that the amendment was drafted to stop searches of places where contraband was being stored, supports respondents' argument. Both the rationale and language of *Minnesota v. Olson*, 495 U.S. 91 (1990), are directly on point and mandate affirmance of the Minnesota Supreme Court's determination that respondent had standing to object to the officer's behavior.[2]

The officer's behavior amounted to a search because, as the Minnesota Supreme Court found, society has determined that the officer's decision to engage in a little

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[2] Both the State of Minnesota and the Amicus Brief of 26 States attempt to recast the issue in this case by implying that this case involves expansion of the exclusionary rule. "Affirming the decision of the Minnesota Supreme Court in this case will erode public confidence in our system of justice and generate disrespect for the law by inappropriately expanding the exclusionary rule in countless cases." Petitioner's brief at 27. "In determining whether the exclusionary rule is applicable, a court is to focus on the extent of a particular defendant's rights under the Fourth Amendment[.]" Brief of 26 States at 6. Of course, the real questions are whether the police have violated the Constitution and whether the Constitution's protections apply to respondents. Resolution of these questions does not require an expansion of the exclusionary rule.

window-peeping was unreasonable; it invaded the privacy of those present inside the apartment.

ARGUMENT

I.

THE MINNESOTA SUPREME COURT WAS CORRECT WHEN IT FOUND THAT RESPONDENTS, AS SOCIAL GUESTS, HAD A REASONABLE EXPECTATION OF PRIVACY IN THE HOME THEY WERE VISITING.

To demonstrate they have a right to complain about the police officer's conduct in this case, respondents must allege a violation of their own constitutional rights, rather than the right of some third party. *United States v. Salvucci*, 448 U.S. 83, 83 (1980). This determination turns on "whether the disputed search . . . has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). A protected Fourth Amendment interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143. Such a legitimate expectation of privacy exists when an individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " *Id.* at 143-44 n. 12, quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

In other words, a defendant must show two things to have the right to object to a search: first, he must show a subjective expectation of privacy; and second, he must show that this expectation was reasonable in light of

"longstanding social custom that serve functions recognized as valuable by society." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). Respondents Carter and Johns have exhibited a subjective expectation of privacy that is reasonable, given the longstanding traditions of the constitution, this Court, and this country.

A.

Minnesota has waived its claim that respondents had no subjective expectation of privacy by failing to assert that claim in the Minnesota courts; in any event, pulling the shades of an apartment as tightly as possible amply demonstrates such a subjective expectation of privacy.

On appeal to this Court, the State of Minnesota has argued that respondents had no subjective expectation of privacy in the apartment they were visiting when the officer peeped in the window. This argument, having been asserted neither to the court below nor to this Court in the petition for writ of certiorari, is not properly before this Court; in any event, respondents exhibited every possible subjective expectation of privacy.

1.

The State of Minnesota may not, for the first time in the history of this case, make a new argument – that respondents did not manifest a subjective expectation of privacy – in their brief to this Court.

For the first time in the over four-year history of this case, the State of Minnesota now argues that "[u]nder the facts presented in this case, Respondents Carter and Johns have not proven that they had a subjective expectation of privacy in the apartment in question because of

the existence of a gap in the window blinds through which Officer Thielen made his observations." Petitioner's brief at 13. But, to quote petitioner's brief to the Minnesota Supreme Court:

> Therefore, the issue to be decided is not whether Appellant had a legitimate expectation of privacy over the inside of the apartment, but whether or not his legitimate expectation of privacy and constitutional right against unreasonable searches and seizures extended to the curtilage of the apartment. It is the position of the State of Minnesota that it did not.

State of Minnesota's brief to the Minnesota Supreme Court at 7. Likewise, in its Petition for Writ of Certiorari to this Court, the State of Minnesota complained only about the Minnesota Supreme Court's determination that respondents' subjective expectation of privacy was reasonable, not that they lacked a subjective expectation of privacy in the apartment:

> The failure of Minnesota's highest court to correctly apply **the second prong** of the United States Supreme Court's analysis of standing (i.e., is the subjective expectation of privacy one in which society will accept as reasonable) has led it to the baffling conclusion . . .

State's petition for Certiorari at 17 (emphasis added).

A litigant challenging the appropriateness of a state supreme court ruling on a federal constitutional question may not present arguments to this Court which have not been presented to the state court and which have not been raised in the petition for certiorari. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992). The state has never before

argued that respondents did not possess a subjective expectation of privacy in the apartment which they were in; consequently, the state is foreclosed from asserting that claim to this Court.

2.

Respondents exhibited a subjective expectation of privacy when, while in the home of another person, they pulled the blinds as tightly as they would go.

If a person does not exhibit a subjective expectation of privacy in relation to his activity, that person cannot claim the protections of the Fourth Amendment. *See Rawlings v. Kentucky*, 448 U.S. 98, 104-105 (1980) (noting, while not holding, that defendant, who had placed contraband in purse of another person present when police were approaching, had little reason to subjectively expect privacy in that purse).

In this case, respondents were in the company of another person at her home; that person had afforded them the privacy of that home. All the people in the apartment exhibited a desire to be left alone; in particular, they exhibited a desire to keep their activities inside the apartment private from outside observation. Indeed, as the Minnesota Supreme Court held, it is "clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn." *State v. Carter*, 569 N.W.2d 169, 174 (Minn. 1997).

B.

The history, purpose, and application of the Fourth Amendment by this Court establish that respondents had a legitimate expectation of privacy in a home in which they were social guests.

As noted, in deciding whether a person may legitimately make a claim that his Fourth Amendment Rights have been violated,[3] this court must focus on whether a defendant "is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." *Rakas* at 139. As with all Fourth Amendment issues, both the history and purpose of the Amendment are relevant in deciding whether a person has a legitimate expectation of privacy in a particular activity. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1978). This Court, of course, also relies heavily on its own precedents in making its determination of whether a person has a legitimate expectation of privacy in a particular activity. *See, generally, Minnesota v. Olson*, 495 U.S. 91 (1990).

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[3] The concept of "standing" to object to a search has been subsumed under the rubric of an analysis which focuses on whether a person has a "legitimate expectation of privacy." *Rakas v. Illinois*, 439 U.S. 128, 138-39 (1978). While the Court in *Rakas* rejected the notion that it served any "useful analytical purpose" to consider the principle of standing apart from substantive Fourth Amendment analysis, the Court acknowledged that "inquiry under either approach is the same" *Id.* at 138-39. *See also Minnesota v. Olson*, 495 U.S. 91, 101 (1990) (referring to the question of whether Olson had a legitimate expectation of privacy as a question of "standing") (Stevens, J., concurring).

1.

The history and purposes of the Fourth Amendment, as well as the intention of its framers, show that respondents were certainly of the class of people intended to be protected by the Fourth Amendment.

In arguing that respondents may not claim that their own Fourth Amendment rights have been violated, Minnesota's main argument has been that respondents had no legitimate expectation of privacy because they were engaged in illegal activity in the apartment. The state has argued that:

> Clearly the nature of the common task engaged in [by respondents while on the premises as social guests] must be looked to, and when such task is illegal, as it is in this case, it cannot confer standing by itself. No one in society is willing to accept drug dealing as a reasonable activity worthy of protection.

State's brief at 9. The state also asserts, without historical or factual support, that "Carter and Johns have not demonstrated that the activities that they were engaged in were intended to be protected by the Fourth Amendment." State's brief at 15-16. The state also makes the unsupported claim that the Fourth Amendment "was not created for the purpose of protecting criminals or making a person's residence a safe haven for criminal activities." State's brief at 17.

In the narrowest possible way, the state is correct. The *purpose* of the framers of the Fourth Amendment was not to shield illegal activity from government intrusion. However, there is no question that the framers were well aware that the Fourth Amendment would inevitably

insure that some illegal activity would not be detected. And there is also no question that they believed that this was a side effect worth accepting. The clear intent of the authors of the Fourth Amendment was to protect people from unwarranted government intrusions, *even when the people enjoying this protection were engaged in illegal activities – including the possession, distribution, and storage of contraband.*[4] "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

As this Court has explained, the Fourth Amendment came into being as a specific reaction to "the ransacking by Crown officers of the homes of citizens in search of evidence or crime or of illegally imported goods." *Frank v. Maryland*, 359 U.S. 360, 363 (1959). The years around the American Revolution provided a time of protest against government excesses, both in the colonies and in England. In 1765, the case of *Entick v. Carrington*, 19 Howell's State Trials, col. 1029,

> announced the principle of English law which became part of the Bill of Rights and whose basic protection has become imbedded in the concept of due process of law. It was there decided that English law did not allow officers of the Crown to break into a citizen's home,

[4] In briefs totaling over 100 pages, the State of Minnesota, the amici 26 attorneys general, and the Solicitor General of the United States of America have not mentioned one word about the history and purposes of the Fourth Amendment or the intent of the framers of that amendment.

> under cover of a general executive warrant, to search for evidence of the utterance of libel.

Frank v. Maryland at 363. And in the colonies, the validity of the Writs of Assistance, which granted unlimited authority to revenue officers and customs officials to conduct searches, was challenged. In 1761,

> James Otis attacked the Writ of Assistance because its use placed "the liberty of every man in the hands of every petty officer." His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that "American Independence was then and there born."

Frank at 363. The history which gave rise to the words of the Fourth Amendment is a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution[.]" *United States v. Rabinowitz*, 339 U.S. 56 (1950). The framers of the Constitution were only too well aware that giving unlimited power to search homes and papers would result in increased criminal prosecutions, and they adamantly rejected the grant of broad, general, and uncontrolled authority to officers of the government. As this Court has said, "the security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

Against this backdrop, Minnesota's repeated argument that standing must be denied to those who are engaged in an unlawful activity falls flat. The makers of the Constitution were fully aware that the Fourth Amendment would protect all citizens, even those who

might be engaged in illegal activities such as the possession of contraband or smuggled goods. It is not that the framers of the Constitution wished to deny government officers effective tools of law enforcement; they simply recognized the huge costs to individual liberty of granting the government unlimited authority. As Justice Douglas wrote, the Fourth Amendment "marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause. . . . " *McDonald v. United States*, 335 U.S. 451, 453 (1948).[5] There is nothing in the history and purpose of the Fourth Amendment that supports the state's argument that respondents have no legitimate expectation of privacy because they are engaged in illegal acts.

2.

This Court's precedents strongly support the Minnesota Supreme Court's conclusion that respondents had a legitimate expectation of privacy as social guests in another person's home.

Since *Katz v. United States*, 389 U.S. 347 (1967), the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims

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[5] Interestingly, *McDonald* involved police officers attempting to confirm their suspicion that illegal gambling activities were taking place in a boarding house by peering through a glass transom. This Court held that the Fourth Amendment required the police to get a warrant before peeking. *McDonald*, 335 U.S. at 454-55.

the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A person's subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable[.]" *Id.*, at 143-144 n. 12, quoting *Katz* at 361 (Harlan, J., concurring).

This Court's decisions on the question of who may claim a legitimate expectation of privacy in the home of another has undergone some transformation since the first case directly confronting this issue, *Jones v. United States*, 362 U.S. 257 (1960), was decided. In that case, the court ruled that Jones could challenge the search of the apartment in which he was found because Jones was "legitimately on the premises." *Id.* at 267.[6] That standard was subsequently rejected by this court as too broad and was replaced by a focus on whether society is willing to accept a person's subjective manifestations of a right to privacy in the place in which the person found him or herself. *Rakas*, 439 U.S. at 142-148.

While *Rakas* changed the *Jones* test, this Court took pains to insist that it would have reached the same result under either test: "We do not question the conclusion in

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[6] Minnesota has argued that the "absurd conclusion" that society (at least constitutionally) recognizes as important the ability to engage in private (even illegal) activities is tantamount to re-establishing the legitimately on the premises standard of *Jones*. State of Minnesota's brief at 19-20. The Minnesota Supreme Court, and respondents, have done no such thing; they have simply recognized that a person's status on the premises is a relevant consideration in determining their legitimate expectations of privacy. The state's argument is simple: a search might be illegal, but no one could complain.

Jones that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful[.]" *Rakas* at 141-142 ("We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place"). And, as the Court observed, it has "on numerous occasions pointed out that cars are not to be treated identically with houses or Apartments for Fourth Amendment purposes." 439 U.S. at 148.

In a post-*Rakas* case, this Court decided that one who was merely storing items at the home of another may, in fact, have standing to object to the search of the home of that other person; the case was remanded for the defendants to attempt to establish their privacy interest. *United States v. Salvucci*, 448 U.S. 83, 97 (1980). Most recently, this Court has decided that a person who has spent one night in a home – even though the purpose of that stay appears to have been to evade arrest – has a legitimate expectation of privacy in that home because society accepts that expectation of privacy as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990).

Minnesota v. Olson left open the question of whether a social guest who has not demonstrated that he is an overnight guest is a person to whom the Fourth Amendment protections apply. In order to answer the question left open in that case, the State of Minnesota has relied on a series of cases which simply do not involve, or do not discuss, whether social guests may claim a legitimate expectation of privacy in the home of another person. In

United States v. Salvucci, 448 U.S. 83 (1980), this Court remanded for the trial court to decide whether a defendant could show a legitimate expectation of privacy in his mother's home; it did not rule that Salvucci has no such expectation. In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court found that an automobile passenger had no legitimate expectation of privacy in an item left in another person's car; it said nothing about privacy in the home.[7] And, in *Brown v. United States*, 411 U.S. 223 (1973), this Court decided that defendants, who were in another state at the time of the search, had no standing to object to evidence seized from a store; *Brown* said nothing about privacy in a person's home. The state simply ignores the crucial significance a home plays in any discussion of Fourth Amendment protections. "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 587 (1980), quoting *Dorman v. United States*, 140 U.S.App.D.C. 313, 317, 435 F.2d 385 (1970). The state's attempt to equate the privacy interest of a passenger in a car or one who resides in another state during the search of a store to the privacy interest of a social guest behind closed blinds and doors ignores the core privacy right we retain in our dwellings.

In practice, then, this Court is very aware that the history and purpose of the Fourth Amendment support

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[7] As the concurrence in *Rakas* notes, "We have repeatedly recognized that [the expectation of privacy] in 'an automobile . . . [is] significantly different from the traditional expectation of privacy and freedom in one's residence.' " 439 U.S. at 154 (Powell, J., concurring), quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

special protections against invasions of the home by the state. In practice, this Court has also extended those protections to house guests of homeowners, recognizing that the relationship of the houseguest to the homeowner is an important one that involves privacy interests for both. *Olson* at 98-99. Respondents were in the home of another person for several hours. They not only shared the homeowner's expectation that their privacy would not be invaded by a police officer, they also had a belief, sanctioned by society, that their privacy would actually be protected by the homeowner.[8]

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[8] The hypothetical posed by the Solicitor General in support of its argument that one must stay overnight before being granted a privacy interest sets up a straw man. The Solicitor General concludes that "one who merely visits the home of another and does not stay there overnight ordinarily arrives without any expectations regarding the admission or exclusion of others. Instead, it is commonly accepted that hosts are free to admit or exclude others as they see fit. For example, one invited to dinner party at another's home would hardly be surprised to find additional guests seated at the table, even though this would render the occasion substantially less private." Solicitor General's brief at 17-18. Aside from the fact that this same argument was rejected in *Olson*, it misses the point; people do, in fact, arrive at the homes of others with *some* expectations about the admission or exclusion of others. The point is not that the dinner party is "accessible to" some other person at some time, "but that it is a temporarily private place whose momentary occupants' expectations of freedom are recognized as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). We commonly expect that the homeowner will admit others to the dinner, but we to do not expect that the police will invade the privacy which the host has afforded to us through his or her invitation.

This Court has summarized the social customs and norms supporting a right to privacy in the home of another in terms equally applicable to this case:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in other's homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town.

Olson at 98. Similarly, to hold that social guests have a legitimate expectation of privacy in the host's home merely recognizes many of the same expectations of privacy enunciated in *Olson*. Being a guest in another's home is a longstanding social custom that serves functions recognized as valuable by society; one need look no further than family gatherings for Thanksgiving meals to recognize the important social function having guests into one's home represents. We are guests in other's homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town. As *Olson* stated: "We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." *Id.*

Even before the *Olson* decision, Professor LaFave outlined its rationale: "A person who is a visitor in the residence of another certainly shares with the resident a

justified expectation of privacy in that place against unlawful police entry of that place which intrudes upon his solitude, privacy, and freedom." 4 W. LaFave, *Search and Seizure*, § 11.3(b), p. 298 (2nd Ed. 1987). This Court's decision in *Olson* has only strengthened the logic behind Professor LaFave's earlier conclusion:

> [I]t is fair to say that the *Olson* decision lends considerable support to the claim that shorter-term guests also have standing. For one thing, by rejecting the contention that a visitor must have "complete dominion and control" the *Olson* court undercut the basis on which many lower courts found shorter-term guests to lack standing. For another, despite the court's emphasis upon the special privacy concerns of guest while they "are asleep" and "cannot monitor [their] own safety or the security of their belongings," that consideration seems largely irrelevant in the *Olson* case itself, where the objected-to police conduct occurred at three o'clock in the afternoon. That is, Olson's 3 p.m. legitimate expectation – in the words of the Court, that "he and his possessions will not be disturbed by anyone but his host and those his host allows inside" – would exist whether he arrived the night before, only that morning, or, indeed, only shortly before the police entry. Moreover, visiting the house of another *without* an overnight stay is (again in the words of *Olson*) likewise "a longstanding social custom that serves functions recognized as valuable by society" and an event during which "hosts will more likely than not respect the privacy interests of their guests."

5 W. LaFave *Search and Seizure* § 11.3(b), p. 137 (3d Ed. 1996) (emphasis in original; footnotes omitted).

Respondents were in an apartment as social guests of the apartment's leaseholder. The door was shut behind them, and the blinds were closed tightly enough so that one could not see through them without engaging in the criminal act of "Interference with Privacy." *See* argument II. They were entitled to assume that their privacy would not be violated by a peeping Tom, even if he was also a police officer. Their expectation of privacy was one which society recognizes as reasonable. They are therefore entitled to object to the police conduct in this case.

II.

THE MINNESOTA SUPREME COURT WAS CORRECT WHEN IT FOUND THAT OFFICER THIELEN, BY LEAVING THE SIDEWALK, WALKING ACROSS THE GRASS AND STARING INTO THE APARTMENT WINDOW FROM A DISTANCE OF TWELVE INCHES, VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." At its core, the Fourth Amendment prohibits government intrusions into an individual's home or dwelling. *Payton v. New York*, 445 U.S. 573, 587 (1980).

Assuming that respondents have a reasonable expectation of privacy in the home they were visiting, the issue becomes whether Officer Thielen's observations into the apartment they were visiting constituted a "search" within the meaning of the Fourth Amendment. *See United*

States v. Dionisio, 410 U.S. 1, 15 (1973) (Fourth Amendment only applies to searches). Officer Thielen "left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12-18 inches of the window and peered through a small gap between the blinds." *State v. Carter*, 569 N.W.2d 169, 178 (Minn. 1997). If Thielen's actions constituted a search, then he violated the Fourth Amendment because he conducted the search without probable cause[9] and without a warrant. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Aguilar v. Texas*, 378 U.S. 108 (1964).

In determining whether police action amounts to a search, the Court's "lodestar" is *Katz v. United States*. *Smith v. Maryland*, 442 U.S. 735, 739 (1979). In *Katz*, this Court held that the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351-353 (1979). In a concurring opinion, Justice Harlan fashioned a two-part test to determine whether a search occurred: "First, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 346, 361 (1967) (Harlan, J. concurring). Subsequent cases have adopted Justice Harlan's two-part analysis. *See, e.g., California v. Ciraolo*, 476 U.S. 207 (1986). Thus, if an individual exhibits a subjective expectation of privacy that society is willing to

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[9] The State conceded that Thielen did not have probable cause before peering into the window. *State v. Carter*, 569 N.W.2d at 178. The State correctly conceded that Thielen did not have probable cause because an anonymous tip by itself cannot constitute probable cause. *Aguilar v. Texas*, 378 U.S. 108 (1974).

recognize as reasonable, police intrusion into that privacy constitutes a Fourth Amendment search.

A.

Respondents exhibited a subjective expectation of privacy by closing the blinds of the apartment as far as they would go.

The first inquiry is whether the individual has "exhibited an actual (subjective) expectation of privacy." *Katz v. United States*, 389 U.S. at 361 (1967) (Harlan, J. concurring). In other words, whether "the individual has shown that he seeks to preserve something as private." *Smith v. Maryland*, 442 U.S. 736, 740 (1979) (citing *Katz v. United States*, 389 U.S. at 361).

Respondents exhibited a subjective expectation of privacy by closing the apartment's blinds. As noted previously, the Minnesota Supreme Court held that respondents had a subjective expectation of privacy; respondents were "inside the apartment of an acquaintance with the doors shut and the blinds drawn." *State v. Carter*, 569 N.W.2d at 174. *Compare Katz v. United States*, 389 U.S. at 352 (defendant demonstrated a subjective expectation of privacy in his phone call by entering the phone booth and shutting the door behind him) and *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (defendant "clearly" manifested a subjective expectation of privacy by erecting a six-foot outer fence and a ten-foot inner fence) *with Smith v. Maryland*, 442 U.S. 735 (1979) (defendant did not have a subjective expectation of privacy in the phone numbers he dialed where the numbers must be

disclosed to the telephone company and the company recorded the numbers for billing purposes).

B.

Respondents' expectation of privacy was reasonable considering that Thielen used "extraordinary measures" to peer into a private residence.

The second part of the *Katz* test is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. at 361 (Harlan, J. concurring). "[T]he correct inquiry is whether the government's intrusion infringes upon personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182-183 (1984). In determining whether the individual's expectation is "reasonable," the Court considers a number of factors. *Oliver v. United States*, 466 U.S. at 178.

The most important factor is the place where the search occurs. Although the Fourth Amendment protects people, not places, the type of protection the Fourth Amendment provides "requires reference to a 'place.'" *Katz v. United States*, 389 U.S. at 361 (Harlan, J. concurring). "[C]ertain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States*, 466 U.S. at 178. The specific language of the Fourth Amendment, "[t]he right of the people to be secure in their . . . houses . . . shall not be violated," "establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his

own home and there be free from unreasonable government intrusions." *Payton v. New York*, 445 U.S. 573, 589-590 (1979), quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).

In this case, Officer Theilen looked through a gap in the blinds directly into the apartment, thereby invading a home – the area that deserves "the most scrupulous protection" from government invasion. *Id.* Although the officer did not physically intrude into the residence, the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. at 353. Indeed, the Fourth Amendment applies

> to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, person liberty and private property.

Boyd v. United States, 116 U.S. 616, 630 (1886).

The three cases relied on by State and its amici, *Florida v. Riley*, 488 U.S. 445 (1989), *United States v. Dunn*, 480 U.S. 294 (1987) and *California v. Ciraolo*, 476 U.S. 207 (1986), did not involve a search of a home. Instead, the Court focused on the lack of privacy interest in a greenhouse, *Florida v. Riley*, 488 U.S. at 450-451, a barn, *United States v. Dunn*, 480 U.S. at 302-303, and a garden, *California v. Ciraolo*, 476 U.S. at 214.

In this case, the police did not invade a garden, barn or greenhouse; the officer invaded a private residence. The difference is substantial: "[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *United States v. Karo*, 468 U.S. 705, 714-15 (1984).

A second factor to be considered in determining whether an individual's expectation of privacy is "reasonable" is the manner in which the police acted. It is not necessarily a violation of the Fourth Amendment for an officer to see or hear something that occurs within a dwelling. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. **But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.**" *Katz v. United States*, 389 U.S. at 351 (emphasis added).

> It is one thing to assert that an occupant cannot claim a justified expectation of privacy as to activities within his dwelling when that conduct is carried out in such a manner as to be readily seen or heard by neighbors or the passing public. It is quite another to declare that citizens cannot feel safe in leaving their windows uncurtained to the skies or in otherwise failing to seal off each and every aperture in their dwellings. And thus when police surveillance takes place at a position which cannot be called a public vantage point, i.e., when the police – though not trespassing upon the defendant's curtilage – resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would ordinarily be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what *Katz* is all about.

1 Wayne R. LaFave, *Search and Seizure*, § 2.3(c) at 482 (3rd Ed. 1996) (citations and internal quotations omitted).

In this case, a unanimous[10] Minnesota Supreme Court held that Thielen's conduct was a "search" because he took "extraordinary measures" to look inside respondent's apartment. "[T]he fact that Thielen left the sidewalk, walked across the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds **makes it clear that he took extraordinary measures** to enable himself to view the inside of a private dwelling." *State v. Carter*, 569 N.W.2d at 178 (emphasis added).

In fact, Thielen's "extraordinary measures" violated a Minnesota statute prohibiting "interference with privacy." Minn. Stat. § 609.746, subd.1(a) provides that a person is guilty of a misdemeanor offense if he:

(1) enters upon another's property;

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[10] Petitioner incorrectly refers to the "majority Minnesota Supreme Court" with regard to whether Thielen conducted a search. Petitioner's Brief, p. 33. Although the dissenters believed that respondents did not have standing to challenge the search, they agreed that the police officer's actions constituted a "search" that violated the Fourth Amendment. *State v. Carter*, 569 N.W.2d at 179 (Stringer, J. dissenting).

> (2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and
>
> (3) does so with the intent to intrude upon or interfere with the privacy of a member of the household.[11]

Based on Thielen's extraordinary measures, not to mention his unlawful conduct, the Minnesota Supreme Court correctly determined that "[i]f we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that an activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy." *State v. Carter*, 569 N.W.2d at 178. *See also State v. Harris*, 919 S.W.2d 619 (Tenn. Crim. App. 1995) (although whatever officers see from vantage point along walkway is not constitutionally protected, police violated Fourth Amendment by walking around exterior of building and gazing in window); *State v. Wooding*, 449 S.E.2d 760 (N.C. Ct. App. 1994) (police officer violated Fourth Amendment by looking into back window of an apartment through three-to-four inch opening in drawn curtains); *Olivera v. State*, 315 So. 2d 487 (Fla. Dist. Ct. App. 1975) (in leaving sidewalk to stand on lawn next to window, police officer violated Fourth Amendment); *Lorenzana v. Superior Court of Los Angeles County*, 9 Cal.3d 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973) (police violated Fourth Amendment by

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[11] This law applies to police officers. *See* Minn. Stat. § 609.746, subd. 1(f) (only certain paragraphs, (b) and (c), do not apply to police officers).

leaving the driveway and peering through a two-inch gap in a drawn shade).

Despite Thielen's "extraordinary measures," the State and its amici claim that, because the officer was "in a place he was allowed to be," the officer was not conducting a search. *See, e.g.*, Brief of 26 States, p. 18. Contrary to the State's claim, the officer was not in a place he was allowed to be.

Thielen was clearly on the apartment's curtilage. Although the State now claims that Thielen peered into the apartment "from a common area outside the curtilage," State's brief, p. 27, the State conceded in its brief to the Minnesota Supreme Court that "Officer's Thielen's observations were from an area adjacent to the apartment **which may be classified as occurring within the 'curtilage' of the residence**." Respondent's brief to the Minnesota Supreme Court, p. 8 (emphasis added). This court will generally not address arguments that were not presented to the State's highest court. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992).

Respondent was correct to concede that Thielen was standing on the curtilage.

> [T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

California v. Ciraolo, 476 U.S. 207, 212-13 (1986) (citations omitted). A home's curtilage, although outside the home literally and figuratively, is nonetheless protected by the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (individual has expectation of privacy in the area immediately outside the home).

Here, Thielen was standing right in front of the window of the apartment, twelve-to-eighteen inches from the window; therefore, he was on the curtilage of the apartment. Because Thielen was standing on the curtilage of the apartment and peering into the residence, he was conducting a search. *See, e.g., United States v. Blount*, 98 F.3d 1489, 1495 (5th Cir. 1996) ("when a police officer walks into partially fenced backyard of a residential dwelling, using a passage not open to the general public, and places his face within inches of a small opening in an almost completely covered rear window to look into the house and its inhabitants, the officer has performed a search within the meaning of the Fourth Amendment."); *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955) ("Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his right to be left alone as guaranteed by the Fourth Amendment."). *Compare California v. Ciraolo*, 476 U.S. 207 (police may look **into** curtilage from publicly navigable airspace in a physically non-intrusive manner).

In making its claim that Thielen had a right to stand directly in front of the apartment window, the State relies mainly on the fact that the search occurred in an apartment rather than a single-family home. Although under

some circumstances those who reside in a multiple-occupancy dwelling may have a lesser expectation of privacy than those who reside in single unit dwellings, both apartment dwellers and private homeowners deserve the same protection from window-peepers. *See Lanza v. New York*, 370 U.S. 139, 143 (1962) ("A hotel room, in the eyes of the Fourth Amendment, may become a person's 'house,' and so, of course, may an apartment.").

While it is true that the curtil ge of an apartment building may be open to the residents of the building, it does not follow that the residents of the apartment building expect that their neighbors, or the police, will stand in front of their windows and peer through closed blinds. Thus, in *Katz*, this court specifically stated that what a person "seeks to preserve as private, **even in an area accessible to the public**, may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351 (emphasis added).

Nonetheless, in a stunning repudiation of the values underlying the Fourth Amendment, the State claims that the police are entitled to enter the curtilage and peer into the window of any multiple-occupancy dwelling – from duplexes to giant hotels, even though the police cannot do the same to single-family houses. The Fourth Amendment does not countenance, and this court should not recognize, such a distinction. *See, e.g., United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976) (tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the public; officer's entry into common area violated tenant's Fourth Amendment rights); *Olivera v. State*, 315 So. 2d 487 (Fla. Dist. Ct. App. 1975) (tenant could reasonably expect that

no one would observe or hear his activities through his bedroom window; therefore, by leaving sidewalk to stand on lawn next to apartment window, police officer violated Fourth Amendment); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (although defendant shared his backyard with other tenants of the apartment building and therefore could not enjoy as much exclusivity as the backyard of a single-family dwelling, the backyard was sufficiently removed and private so that he could reasonably expect privacy).

The State and its amici also make much of the fact that Thielen's observations were neither aided or enhanced. *See, e.g.*, Brief of 26 States, p. 23. This is true; it is also irrelevant. Since Thielen should not have been peering through the closed blinds from the curtilage of the apartment, it hardly matters that he did so without binoculars.

What is important is that Thielen stood directly in front of the window and peered into the apartment for fifteen minutes. A brief glance at a window is far different than standing twelve inches from the window and staring into the apartment.

The law in Minnesota that prohibits interference with property, Minn. Stat. § 609.746, does not prohibit glancing at a window. But it does prohibit surreptitiously gazing, staring, or peeping into the window of another person's dwelling. Thus, while respondents may not "reasonably" expect privacy from people walking by the apartment and glancing at the window, respondents had a more than reasonable expectation that no one would stand twelve inches from the window and peer through a small

gap in the blinds for fifteen minutes. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (although officer could justifiably discover contraband through sense of touch, officer could not continue to explore object he discovered after he concluded that it was not a weapon).

The resolution of this issue is complicated somewhat by what the officer saw when he peered through the window, that is, evidence of a crime. The Fourth Amendment, however, protects more than the guilty. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). A quarter-century ago, Professor Amsterdam recognized the fundamental flaw in the State's argument:

> But, unless the Fourth Amendment controls tom-peeping and subjects it to a requirement of antecedent cause to believe that what is inside any particular window is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out. Should we say that prospect is not alarming because the innocent homeowner need not fear that he will get caught doing anything wrong? The Fourth Amendment protects not only against incrimination, but against invasions of privacy – or rather, as *Katz* holds, of the right to maintain privacy without giving up too much freedom as the cost of privacy. The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 402-403 (1974). Here, the State argues that, **in spite of closed blinds**, homeowners must still live under "pain of surveillance."

This Court must preserve the sanctity of the home, the core value of the Fourth Amendment, for everyone. This Court should hold that the drawing of blinds in an apartment building manifests a subjective expectation of privacy that society recognizes as reasonable. And thus, the Court must conclude that when Thielen peered through the closed blinds, he conducted a search that violated the Fourth Amendment.

By closing the apartment blinds, respondents exhibited a subjective expectation of privacy that society must recognize as reasonable. Thielen invaded this expectation, and conducted a search, by standing on the curtilage, off the sidewalk, twelve inches from the window and peering into the apartment. Because Thielen had neither a warrant nor probable cause, he violated the Fourth Amendment.

CONCLUSION

The Minnesota Supreme Court was correct in holding that respondents, as social guests in the home of another person they were visiting, had a reasonable expectation of privacy in that home. The officer's window-peeking violated that privacy, and amounted to a search under the Fourth Amendment to the United States Constitution. The opinion of the Minnesota Supreme Court must be affirmed.

Respectfully submitted,

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